

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

COLONY NATIONAL INSURANCE	)	Case No.:
COMPANY,	)	
	)	
Plaintiff,	)	COMPLAINT FOR
	)	DECLARATORY JUDGMENT,
	)	REFORMATION,
	)	CONTRIBUTION AND
v.	)	SUBROGATION
	)	
	)	
BFC GAS & ELECTRIC COMPANIES, L.C.,	)	
BFC GAS COMPANY, L.C., BFC ELECTRIC	)	
COMPANY, LC, JEFF CARTER, WARREN	)	
DUNHAM, LIBERTY MUTUAL INSURANCE	)	
COMPANY, JEFFREY D. HERMANSON and	)	
CINDY HERMANSON	)	
Defendants.	)	

Plaintiff Colony National Insurance Company (“Colony”) brings this action against defendants BFC Gas & Electric Companies, L.C. (“BFCG&E”), BFC Gas Company, L.C. (“BFC Gas”), BFC Electric Company, L.C. (“BFC Electric”), (unless otherwise noted, collectively referred to as “BFC”), Jeff Carter (“Carter”), Warren Dunham (“Dunham”), Liberty Mutual Insurance Company (“Liberty Mutual”), Jeffrey D. Hermanson (“Hermanson”) and Cindy Hermanson (“Mrs. Hermanson”) (Hermanson and Mrs. Hermanson referred to collectively as “the Hermansons”), and alleges as follows:

PARTIES

1. Plaintiff Colony is a Virginia corporation, with its principal place of business in Richmond, Virginia.
2. Defendant BFC Electric Company, L.C. is a domestic limited liability business entity

incorporated in the State of Iowa on December 13, 1995.

3. Defendant BFC Gas Company, L.C. is a domestic limited liability business entity incorporated in the State of Iowa on December 7, 1995.

4. Defendant BFC Gas & Electric Companies, L.C. is a domestic business entity of unknown form whose principal place of business is in the State of Iowa.

5. Defendant Carter is a citizen of the state of Iowa.

6. On information and belief, Defendant Carter is a member of the limited liability corporations, BFC G&E, BFC Gas and BFC Electric.

7. Defendant Dunham is a citizen of the state of Iowa.

8. On information and belief, Defendant Dunham is a member of the limited liability corporations, BFC G&E, BFC Gas and BFC Electric.

9. Defendants Hermanson and Mrs. Hermanson are individuals, and each is a plaintiff in the underlying suit which is the subject of this insurance coverage action.

10. On information and belief, the Hermansons are citizens of Linn County Iowa.

11. On information and belief, Defendant Liberty Mutual is a private mutual insurance company with its principal place of business in Boston, Massachusetts.

JURISDICTION

12. The Court has jurisdiction over this action under 28 United States Code Section 1332(a), because Plaintiff and all Defendants are citizens of different states, and the matter in controversy, exclusive of interest and costs, exceeds Seventy-Five Thousand Dollars (\$75,000). The Court further has jurisdiction under 28 U.S.C. § 2201, in that Colony is seeking a declaration from this Court regarding the

parties' rights and obligations with respect to a policy of Commercial General Liability insurance issued by Colony, and also with respect to a Workers Compensation and Employers Liability Policy issued by Liberty Mutual. The defendants, and each of them, contest Colony's position about the parties' rights and obligations under said policies, and therefore a true and actual controversy exists between the parties. The Court is vested, under 28 U.S.C. § 2201, with the power to declare the rights and obligations of the parties hereto, and to provide such other relief as may be necessary.

VENUE

13. Venue is laid in Cedar Rapids Division of the District Court of Northern Iowa under 28 U.S.C. §1391(a) by virtue of the fact that this action seeks the interpretation of a policy of Commercial General Liability and Workers Compensation and Employers Liability insurance issued in the State of Iowa, to the named insured BFC, an Iowa limited liability company. Furthermore, a substantial part of the events and omissions giving rise to this action occurred in Cedar Rapids, Iowa.

FACTUAL ALLEGATIONS

The Underlying Hermanson Action Against BFC, Carter and Dunham

14. On or about May 23, 2007, Jeffrey D. Hermanson and Cindy Hermanson filed a complaint in a lawsuit in the Iowa District Court in and for Linn County, Case No. LACV 058127 (the "Hermanson Action"), against Defendants BFC Electric Company, L.C., Carter and Dunham, claiming that Plaintiff Jeffrey D. Hermanson was injured while working for Defendant BFC Electric Company, L.C. A true and correct copy of the complaint filed in the Hermanson Action is attached hereto and incorporated by reference herein as Exhibit A.

15. The Hermanson Action alleges that on or about April 4, 2005, Jeffrey Hermanson entered into

a contract for labor with BFC Electric Company, L.C.

16. The Hermanson Action further alleges that on June 15, 2005, a fire started on a feed belt in the plant owned and operated by BFC Electric Company, L.C., Carter and Dunham, and that Jeffrey Hermanson was requested by Carter to assist in putting the fire out.

17. The Hermanson Action alleges that while attempting to put out the fire, there was a dust explosion that seriously injured Jeffrey Hermanson, causing burns over approximately 40% of his body (hereinafter referred to as the "Incident").

18. The Hermanson Action alleges general negligence against BFC Electric Company, L.C., Carter and Dunham, and alleges such negligence was the cause of the injuries and damages sustained by the Hermansons.

19. Cindy Hermanson also seeks damages as a result of Jeffrey Hermanson's injuries.

20. The Hermanson Action seeks a judgment against BFC Electric Company, L.C., Carter and Dunham, in an amount that will adequately compensate Jeffrey Hermanson and Cindy Hermanson for their losses.

Colony Incurs Defense Costs in the Hermanson Action

21. Colony has undertaken defense of BFC Electric Company, L.C. and its purported members, Carter and Dunham, in the Hermanson Action under a full and complete reservation of rights to deny coverage, withdraw from the defense, and obtain reimbursement of any defense costs incurred defending against claims not potentially covered under a policy of commercial general liability insurance issued by Colony.

. 22. Colony has incurred attorneys' fees and defense costs with regard to its defense of BFC

Electric Company, L.C., Carter and Dunham in the Hermanson Action.

23. Colony did not act as a volunteer in its undertaking of said defense of the Hermanson Action.

24. BFC Electric Company, L.C., Carter and Dunham have accepted the defense offered by Colony under reservation of rights without objection.

Liberty Mutual's Policy

25. Defendant Liberty Mutual provided workers compensation insurance to BFC Gas Electric Companies, L.C., through a policy of Workers Compensation and Employers Liability Insurance, policy number WC5-34S-382174-015, effective May 19, 2005 to May 19, 2006 ("the Liberty Mutual policy"). The Liberty Mutual policy applies to the Workers Compensation Law of the state of Iowa and contains Employers Liability Insurance limits of \$500,000 for Bodily Injury by Accident for each accident.

26. Under an exclusion in the policy, Liberty Mutual does not cover bodily injury to Carter as a member of BFC Gas Electric Companies, L.C.

27. On information and belief, the Liberty Mutual policy provides for calculation of premiums on a retrospective basis, and for audit to determine such premium.

28. As of May 19, 2005, all employees working for BFC Gas Electric Companies, L.C. were employed under contracts of labor similar to Jeffrey Hermanson's contract of labor. In addition, on the date of the Incident, which fell within the Liberty Mutual policy effective dates, all employees working for BFC Gas Electric Companies, L.C. were employed under contracts of labor similar to Jeffrey Hermanson's contract of labor.

29. Upon information and belief, the premium basis of the Liberty Mutual policy includes wages of

those employees of BFC Gas Electric Companies, L.C. which were under contracts of labor similar to Jeffrey Hermanson's.

30. Upon information and belief, Jeffrey Hermanson's wages during the Liberty Mutual policy effective dates were included in the calculation of premium for the Liberty Mutual policy.

31. A true and correct copy of the Liberty Mutual policy is attached as Exhibit B.

32. The Liberty Mutual policy does not define the term "employee," but does contain certain pertinent terms and provisions, including, but not limited to, the following:

PART ONE - WORKERS COMPENSATION INSURANCE

A. How This Insurance Applies

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

- 1. Bodily injury by accident must occur during the policy period.*
- 2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.*

* * * * *

PART TWO - EMPLOYERS LIABILITY INSURANCE

A. How This Insurance Applies

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

- 1. The bodily injury must arise out of and in the course of the injured employee's employment by you.*
- 2. The employment must be necessary or incidental to your work in a state or territory listed in item 3.A. of the Information Page.*
- 3. Bodily injury by accident must occur during the policy period.*
- 4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.*
- 5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.*

B. We Will Pay

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance. The damages we will pay, where recovery is permitted by law, include damages:

1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee.

2. for care and loss of services; and

3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee;

provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and

4. Because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as an employer.

* * * * *

D. We Will Defend

We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

Colony's Policy

33. Colony provided commercial general liability insurance to BFC Gas & Electric Companies, L.C., under policy number AR5360031, effective May 7, 2005 to May 7, 2006 ("the Colony Policy").

34. A true and correct copy of the Colony Policy is attached as Exhibit C.

35. The Colony Policy contains certain pertinent terms and provisions, including, but not limited to, the following:

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages

because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

(1) The amount we will pay for damages is limited as described in Section III- Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments- Coverages A and B.

b. This Insurance applies to “bodily injury” and “property damage” only if:

(1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;

(2) The “bodily injury” or “property damage” occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II- Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

* * * * *

2. Exclusions

This insurance does not apply to:

* * * * *

d. *Workers= Compensation And Similar Laws*

Any obligation of the insured under a workers’ compensation, disability benefits or unemployment compensation law or any similar law.

e. *Employer’s Liability*

“Bodily injury” to:

(1) An “employee” of the insured arising out of and in the course of:

(A) Employment by the insured; or

(B) Performing duties related to the conduct of the insured's business; or
(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and
(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

* * * * *

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

* * * * *

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

* * * * *

SECTION V - DEFINITIONS

* * * * *

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

36. The Colony Policy also contains Endorsement U275-0205, LEASED AND TEMPORARY WORKERS EXCLUSION, which provides as follows:

A. SECTION I - COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions and COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY, 2. Exclusions are amended and the following is added:

* * * * *

LEASED AND TEMPORARY WORKERS EXCLUSION

This insurance does not apply to "bodily injury", "property damage", or "personal and

advertising injury” arising directly or indirectly out of, resulting from, caused or contributed to by:

- a. Any “leased worker” or “temporary workers”; or*
- b. Any spouse, child, parent, brother or sister of that “leased worker” or “temporary worker” as a consequence of a. above.*

This exclusion applies:

- a. Whether the insured may be held liable as an employer or in any other capacity;*
- b. To any obligation to share damages with or repay someone else who must pay damages because of the injury; and*
- c. To liability assumed by the insured under an “insured contract”.*

B. The definition of “employee” under SECTION V - DEFINITIONS, is deleted in its entirety and replaced by the following:

“Employee” includes a “leased worker” and “temporary worker”.

** * * * **

37. The Colony Policy also contains Endorsement U048-0904,EMPLOYMENT-RELATED PRACTICES EXCLUSION, which provides as follows:

A. SECTION I - COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions and SECTION I - COVERAGES, COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY, 2. Exclusions are amended and the following added:

This insurance does not apply to:

Employment-Related Practices

"Bodily injury" or "personal and advertising injury" to:

- (1) A person arising out of any:*
 - (a) Refusal to employ that person;*
 - (b) Termination of that person's employment; or*
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, assault, battery, discrimination or abuse including sexual abuse directed at any person: or*

- (2) *The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" or "personal and advertising injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.*

This exclusion applies:

- (1) *Whether the insured may be liable as an employer or in any other capacity; and*
(2) *To any obligation to share damages with or repay someone else who must pay damages because of the injury.*

* * * * *

38. The Colony Policy also contains Endorsement U250-0405, COMPOSITE RATE, which provides that the premium for the Colony Policy is based on "PAYROLL" as an exposure base. Endorsement U250-0405 specifically references 570,000 "Units of Exposure" for "PAYROLL" and defines "Payroll" as A...the total payroll earned during the policy period by proprietors and by all employees, leased employees and "temporary workers" of the Named Insured and includes commissions, bonuses, extra pay for overtime work and pay for holidays, vacations or period of sickness..."

39. Upon information and belief, Jeffrey Hermanson's earnings were included within the "PAYROLL" "Units of Exposure" figure set forth in the COMPOSITE RATE endorsement attached to the Colony Policy effective at inception.

Additional Facts as to Jeffrey Hermanson's Employment Status

40. Jeffrey Hermanson entered into contracts for labor with Defendant BFC Electric Company, L.C. on both April 4, 2005 and June 8, 2005.

41. On information and belief, Jeffrey Hermanson has been employed by BFC Electric Company, L.C. during the following time frames, among others: (1) from the beginning of 2003 and throughout 2003;

(2) from January 2004 through March of 2005; (2) for up to sixty (60) days starting on April 4, 2005; (3) for up to 90 days starting on June 8, 2005; (4) from approximately August 12 through October 23, 2005; and, (5) from approximately November 7, 2005 until terminated.

42. After the Incident Jeffrey Hermanson returned to work for BFC Electric.

43. Jeffrey Hermanson received worker's compensation benefits paid under the Liberty Mutual policy as a result of the Incident.

44. Upon information and belief, Cindy Hermanson received worker's compensation benefits paid under the Liberty Mutual policy as a result of the Incident.

45. Jeffrey Hermanson and/or Cindy Hermanson have an open file with the Iowa Workforce Development, Division of Workers' Compensation, file number 1413504, and have received workers compensation benefits on account of the Incident.

46. A true and correct copy of the contents of the Jeffrey Hermanson Iowa Workforce Development, Division of Workers' Compensation file, number 1413504, in relation to the benefits received as a result of the Incident, is attached as Exhibit D (the "Hermanson WC File").

47. According to an Action History Entry in the Hermanson WC File dated July 13, 2005, the Comments with respect to the Incident state as follows: "employee was assisting to put out a fire when a flash explosion occurred."

48. Liberty Mutual made payments to Jeffrey Hermanson and/or Cindy Hermanson for workers compensation benefits under the Liberty Mutual policy as a result of the Incident.

49. On information and belief, at the time Liberty Mutual made payments to Jeffrey Hermanson and/or Cindy Hermanson for workers compensation benefits under the Liberty Mutual policy, Liberty Mutual was not acting as a volunteer with respect to those payments.

50. On information and belief, as of March 6, 2007, Liberty Mutual had made total payments of approximately \$375,809 with regard to the Incident.

51. On information and belief, as of March 6, 2007, Liberty Mutual had made indemnity payments of approximately \$27,818 with regard to the Incident.

52. On information and belief, as of March 6, 2007, Liberty Mutual had made medical payments of approximately \$339,642 with regard to the Incident.

53. On information and belief, as of March 6, 2007, Liberty Mutual had made expense payments of approximately \$8,349 with regard to the Incident.

54. On information and belief, as of March 6, 2007, Liberty Mutual had estimated that the total workers compensation benefits with regard to the Incident would be \$565,735.

55. On information and belief, as of March 6, 2007, Liberty Mutual had estimated that the total indemnity payments with regard to the Incident would be \$97,820.

56. On information and belief, as of March 6, 2007, Liberty Mutual had estimated that the total medical expense payments with regard to the Incident would be \$451,575.

57. On information and belief, as of March 6, 2007, Liberty Mutual had estimated that the total expense payments with regard to the Incident would be \$16,340.

58. Liberty Mutual has not instituted any civil or regulatory proceedings to recover from Jeffrey Hermanson and/or Cindy Hermanson any of the workers' compensation benefits paid to date under the Liberty Mutual policy as a result of the Incident.

COUNT ONE

(Colony Has No Duty To Defend BFC)

59. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

60. An actual controversy exists in that Colony contends that the underlying Hermanson Action does not give rise to the potential for coverage under the Colony Policy, and Colony has no duty to defend BFC in the Hermanson Action.

61. BFC contends that Colony does have a duty to defend it in the Hermanson Action.

62. Under 28 U.S.C. § 2201, Colony accordingly seeks a judicial declaration of the parties' respective rights and duties under the Colony Policy.

COUNT TWO

(Colony Has No Duty To Defend Carter)

63. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

64. An actual controversy exists in that Colony contends that the underlying Hermanson Action does not give rise to the potential for coverage under the Colony Policy, and Colony has no duty to defend Carter in the Hermanson Action.

65. Carter contends that Colony does have a duty to defend him in the Hermanson Action.

66. Under 28 U.S.C. § 2201, Colony accordingly seeks a judicial declaration of the parties' respective rights and duties under the Colony Policy.

COUNT THREE

(Colony Has No Duty To Defend Dunham)

67. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

68. An actual controversy exists in that Colony contends that the underlying Hermanson Action does not give rise to the potential for coverage under the Colony Policy, and Colony has no duty to defend Dunham in the Hermanson Action.

69. Dunham contends that Colony does have a duty to defend him in the Hermanson Action.

70. Under 28 U.S.C. § 2201, Colony accordingly seeks a judicial declaration of the parties' respective rights and duties under the Colony Policy.

COUNT FOUR

(Colony Has No Duty To Indemnify BFC)

71. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

72. An actual controversy exists in that Colony contends that the underlying Hermanson Action does not give rise to the potential for coverage under the Colony Policy, and Colony has no duty to indemnify BFC for any damages alleged and/or awarded in the Hermanson Action.

73. BFC contends that Colony does have a duty to indemnify it in the Hermanson Action.

74. Under 28 U.S.C. § 2201, Colony accordingly seeks a judicial declaration of the parties' respective rights and duties under the Colony Policy.

COUNT FIVE

(Colony Has No Duty To Indemnify Carter)

75. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

76. An actual controversy exists in that Colony contends that the underlying Hermanson Action does not give rise to the potential for coverage under the Colony Policy, and Colony has no duty to indemnify Carter for any damages alleged and/or awarded in the Hermanson Action.

77. Carter contends that Colony does have a duty to indemnify him in the Hermanson Action.

78. Under 28 U.S.C. § 2201, Colony accordingly seeks a judicial declaration of the parties' respective rights and duties under the Colony Policy.

COUNT SIX

(Colony Has No Duty To Indemnify Dunham)

79. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

80. An actual controversy exists in that Colony contends that the underlying Hermanson Action does not give rise to the potential for coverage under the Colony Policy, and Colony has no duty to indemnify Dunham for any damages alleged and/or awarded in the Hermanson Action.

81. Dunham contends that Colony does have a duty to indemnify him in the Hermanson Action.

82. Under 28 U.S.C. § 2201, Colony accordingly seeks a judicial declaration of the parties' respective rights and duties under the Colony Policy.

COUNT SEVEN

(Exclusion d. of the Colony Policy Applies and Excludes Coverage)

83. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

84. Exclusion d. of the COVERAGE A portion of the Colony Policy bars coverage for "[a]ny obligation of the insured under a workers' compensation law."

85. At the time of his alleged injuries in the Hermanson Action, Jeffrey Hermanson was working under a contract of service for BFC Electric. At that time he was an "employee," within the meaning of that term, as it is used under Iowa Workers' Compensation statutory law and in the Colony Policy.

86. Jeffrey Hermanson's injuries, as alleged in the Hermanson Action, arose out of his employment by BFC Electric, which was an "employer," within the meaning of that term, as it is used under Iowa Workers' Compensation statutory law.

87. Hermanson received workers' compensation benefits as a result of the Incident, including in the form of payments made by Liberty Mutual under the Liberty Mutual policy.

88. As a result of the foregoing facts and circumstances, Exclusion d. of the Colony Policy applies to the injuries allegedly sustained by the Hermansons as a result of the Incident described in the Hermanson Action.

89. As a result of the foregoing facts and circumstances, the Colony Policy provides no coverage for BFC, Carter or Dunham for the damages alleged by Jeffrey Hermanson or Cindy Hermanson in the Hermanson Action.

COUNT EIGHT

(Exclusion e. of the Colony Policy Applies and Excludes Coverage)

90. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

91. Exclusion e. of the COVERAGE A portion of the Colony Policy, as amended by endorsement U275-0205, LEASED AND TEMPORARY WORKERS EXCLUSION, bars coverage for "bodily injury" to an "employee," including "leased workers" and "temporary workers," of the insured arising out of employment by the insured or performing duties related to the conduct of the insured's business. Exclusion e. also bars coverage for a spouse of the "employee," as defined.

92. At the time of his injuries alleged in the Hermanson Action, Jeffrey Hermanson was an “employee” of BFC Electric, as that term is generally recognized under applicable law and as that term was used in the Colony Policy.

93. Jeffrey Hermanson’s injuries, as alleged in the Hermanson Action, arose out of his employment by BFC Electric.

94. At the time the injury alleged in the Hermanson Action occurred, Cindy Hermanson was the spouse of Jeffrey Hermanson.

95. Because Jeffrey Hermanson was an employee of BFC Electric, and was performing duties related to the conduct of Colony’s insured’s business at the time the injuries alleged in the Hermanson Action occurred, Exclusion e. applies to preclude coverage for the Hermanson Action.

96. As a result of the foregoing facts and circumstances, the Colony policy provides no coverage for BFC, Carter or Dunham for the damages alleged by Jeffrey Hermanson or Cindy Hermanson in the Hermanson Action.

COUNT NINE

(The Employment-Related Practices Coverage Exclusion in the Colony Policy Applies)

97. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

98. The Employment-Related Practices Exclusion of the Colony Policy bars coverage for “‘Bodily injury’ to ... a person arising out of any ... [e]mployment-related practices, policies, acts or omissions....,” and applies “[w]hether the insured is liable as an employer or in any other capacity... .”

99. At the time of the injuries sustained in the Incident as alleged in the Hermanson Action, Jeffrey Hermanson was within the scope of his employment by BFC Electric.

100. Jeffrey Hermanson's injuries, as alleged in the Hermanson Action, arose out of his employment by BFC Electric, and are alleged to be a result of acts or omissions by his employers.

101. At the time the injuries alleged in the Hermanson Action occurred, Cindy Hermanson was the spouse of Jeffrey Hermanson.

102. Because Jeffrey Hermanson was injured in the Incident as a result of alleged acts or omissions by his employers while he was acting within the scope of his employment by BFC Electric, the Employment-Related Practices Exclusion applies to preclude coverage for the Hermanson Action.

103. As a result of the foregoing facts and circumstances, the Colony Policy provides no coverage for BFC, Carter or Dunham for the damages alleged by Jeffrey Hermanson or Cindy Hermanson in the Hermanson Action.

COUNT TEN

(Reformation of the Colony Policy)

104. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

105. On information and belief, in applying for and entering into the insuring agreement under the Colony Policy, BFC Gas & Electric Companies, L.C. did not intend that "bodily injury" to contract labor employees such as Hermanson and others would be covered under the Colony Policy. Instead, it intended that Iowa workers' compensation provisions would apply to "bodily injury" to contract labor employees

such as Hermanson and others, and had secured workers' compensation and employers' liability coverage under the Liberty Mutual policy for such purpose.

106. The Colony Policy also contains Endorsement U250-0405, COMPOSITE RATE, which provides that the premium for the Colony Policy is based on PAYROLL as an exposure base. Individuals working for BFC under contracts of labor as of the inception of the Colony Policy, including Jeffrey Hermanson, were included in the figure reported in the "PAYROLL" "Units of Exposure" under the Colony Policy. Colony intended that all such individuals would be treated as "employees," as that term is defined under the Colony Policy, at the time it entered into the contract of insurance with BFC.

107. On or about April 28, 2005, BFC submitted an ACORD insurance application, signed by Carter, to Colony for a "Commercial Package" to include Commercial General Liability ("CGL") insurance, Workers Compensation ("WC") insurance and Employee Benefits Liability ("EBL") insurance. In the section of the application relating to EBL coverage, BFC indicated that it had 13 employees.

108. When applying for a renewal of the Colony Policy in or about March of 2006, BFC, directly and/or through its agents for procurement of insurance, represented that there had been no general liability losses during the Colony policy period. Said representation would have been false to the extent that BFC believed that Hermanson was not an "employee" within the meaning of that term under the Colony Policy.

109. The Colony Policy should be reformed to clarify that purported contract laborers, such as Jeffrey Hermanson, fall within the Colony Policy definition of "employee", to reflect the actual intent of the parties to the contract of insurance.

COUNT ELEVEN

(Liberty Mutual Has a Duty to Defend BFC, Carter and/or Dunham)

110. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

111. The allegations of the Hermanson Action, and additional information revealed in the course of discovery and investigation, triggers Liberty Mutual's duty to defend under PART TWO - EMPLOYERS LIABILITY INSURANCE of the Liberty Mutual policy, which provides a duty to defend any proceeding or suit against BFC arising out of and in the course of an injured employee's employment by BFC.

112. At the time of his injuries alleged in the Hermanson Action, Jeffrey Hermanson was an employee of BFC, and his injuries alleged in the Hermanson Action arose out of his employment by BFC.

113. At the time the injury alleged in the Hermanson Action occurred, Cindy Hermanson was the spouse of Jeffrey Hermanson.

114. Liberty Mutual has a duty to defend BFC, Carter and/or Dunham in the Hermanson Action against the claims for damages alleged by Jeffrey Hermanson and Cindy Hermanson.

COUNT TWELVE

(Liberty Mutual Has a Duty to Indemnify)

115. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

116. The allegations of the Hermanson Action, and additional information revealed in the course of discovery and investigation, triggers Liberty Mutual's duty to indemnify under PART ONE - WORKERS COMPENSATION INSURANCE of the Liberty Mutual policy, which provides workers compensation

insurance for bodily injury to an employee caused or aggravated by the conditions of the employee's employment by BFC.

117. In the alternative, the allegations of the Hermanson Action, and additional information revealed in the course of discovery and investigation, triggers Liberty Mutual's duty to indemnify under PART TWO - EMPLOYERS LIABILITY INSURANCE of the Liberty Mutual policy, which provides employers liability insurance to BFC for bodily injury by accident or bodily injury by disease.

118. At the time of his injuries alleged in the Hermanson Action, Jeffrey Hermanson was an employee of BFC, and his injuries alleged in the Hermanson Action arose out of his employment by BFC.

119. At the time the injury alleged in the Hermanson Action occurred, Cindy Hermanson was the spouse of Jeffrey Hermanson.

120. Liberty Mutual has paid workers compensation benefits to Jeffrey Hermanson for the injuries alleged in the Hermanson Action.

121. Liberty Mutual has paid workers compensation benefits to Cindy Hermanson for the injuries alleged in the Hermanson Action.

122. Liberty Mutual has a duty to indemnify its insureds for all benefits due to Jeffrey Hermanson and/or Cindy Hermanson arising out of the Incident, or in the alternative, to pay those benefits directly to Jeffrey and/or Cindy Hermanson.

COUNT THIRTEEN

(Contribution From Liberty Mutual)

123. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

124. Plaintiff Colony has paid for BFC, Carter and Dunham's entire defense in the Hermanson Action. Colony had no obligation to pay for the defense of BFC, Carter and Dunham in any respect. Liberty Mutual had an obligation to share in the defense of BFC, Carter and Dunham in the Hermanson Action, and to assume the defense of BFC, Carter and Dunham in its entirety.

125. BFC, Carter and Dunham were entitled, under the Liberty Mutual policy, to receive from Liberty Mutual a full defense against the Hermanson Action. Colony has demanded that Liberty Mutual contribute to BFC, Carter and Dunham's defense costs incurred in the Hermanson Action. Liberty Mutual has failed and refused, and continues to fail and refuse, to contribute its share of BFC, Carter and Dunham's defense costs in the Hermanson Action.

126. Colony is entitled to contribution from Liberty Mutual for expenses incurred in defending BFC, Carter and Dunham in the Hermanson Action.

COUNT FOURTEEN

(Contractual Subrogation Against Liberty Mutual)

127. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

128. The Colony Policy includes a subrogation clause, under which Colony is contractually subrogated to BFC, Carter and/or Dunham's rights, including their respective rights under the Liberty

Mutual policy. Under the Liberty Mutual policy, BFC, Carter and/or Dunham had the right to receive from Liberty Mutual a defense against the Hermanson Action. Liberty Mutual has failed and refused, and continues to fail and refuse, to assume its share of BFC, Carter and Dunham's defense costs.

129. Colony, having paid one hundred percent of the defense costs of BFC, Carter and Dunham in the Hermanson Action, and having paid more than its proportionate share of the costs of defending the Hermanson Action, is now entitled to recover those sums from Liberty Mutual, standing in the place of BFC, Carter and Dunham.

COUNT FIFTEEN

(Equitable Subrogation Against Liberty Mutual)

130. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

131. Under the Liberty Mutual policy, BFC, Carter and Dunham have the right to receive from Liberty Mutual a defense against the Hermanson Action. Liberty Mutual, however, has not paid any of BFC, Carter or Dunham's defense costs, which have to date been paid solely by Colony. As a result of the foregoing described facts and circumstances, it would be inequitable and unjust to require Colony to bear the burden of the defense of the Hermanson Action.

132. Colony, having paid one hundred percent of the defense costs of Liberty Mutual's insureds, BFC, Carter and Dunham, in the Hermanson Action, is equitably subrogated to BFC, Carter and Dunham's rights under the Liberty Mutual policy, and is now entitled to recover from Liberty Mutual the full amount of BFC, Carter and Dunham's defense costs, as well as any other costs incurred in the Hermanson Action.

COUNT SIXTEEN

(Restitution Against BFC, Carter, and Dunham)

133. Colony incorporates by reference the allegations of paragraphs 1 through 58 as if set forth in full herein.

134. Colony has incurred attorney's fees and defense expenses in defending BFC, Carter and Dunham in the Hermanson Action, while it conducted its coverage investigation.

135. Colony's coverage investigation has determined that there is no potential coverage for the Hermanson Action under the Colony Policy for the reasons set forth herein.

136. The Liberty Mutual policy provides coverage for the defense of BFC, Carter and Dunham in the Hermanson Action, as well as for damages alleged in the Hermanson Action.

137. Because there is no coverage under the Colony Policy for the reasons alleged herein, including, without limitation, that the Colony Policy is subject to reformation, Colony is entitled to restitution and reimbursement of all attorney's fees and defense expenses incurred by it in the Hermanson Action, in an amount according to proof.

138. Colony provided a defense to the Hermanson Action under a reservation of rights, including the right to recover defense expenses if it is determined that no coverage is provided under the Colony Policy.

139. In addition, because there is no coverage under the Colony Policy, Colony conferred a benefit on BFC, Carter and Dunham to which they were not entitled. As such, Colony is entitled to restitution and reimbursement of all attorney's fees and defense expenses incurred by Colony in the Hermanson Action from BFC, Carter and Dunham.

PRAYER FOR RELIEF

Wherefore, Plaintiff requests the following relief:

A. As to Counts One through Three, Plaintiff seeks a judicial declaration that it has no duty to defend BFC, Carter and/or Dunham under the Colony Policy with respect to the Hermanson Action. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law;

B. As to Counts Four through Six, Plaintiff seeks a judicial declaration that it has no duty to indemnify BFC, Carter and/or Dunham under the Colony Policy with respect to any damages relating to the Hermanson Action. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law;

C. As to Count Seven, Plaintiff seeks a declaration that exclusion d. of the Colony Policy applies and that Colony therefore has no duty to defend or indemnify BFC, Carter or Dunham for the Hermanson Action. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law;

D. As to Count Eight, Plaintiff seeks a declaration that exclusion e. of the Colony Policy applies and that Colony therefore has no duty to defend or indemnify BFC, Carter or Dunham for the Hermanson Action. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law;

E. As to Count Nine, Plaintiff seeks a declaration that the Employment-Related Practices Exclusion of the Colony Policy applies and that Colony therefore has no duty to defend or indemnify BFC, Carter or

Dunham for the Hermanson Action. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law;

F. As to Count Ten, Plaintiff is entitled to a reformation of the Colony Policy to clarify that Jeffrey Hermanson is an "employee" as defined by the Colony Policy;

G. As to Count Eleven, Plaintiff seeks a declaration that Liberty Mutual has a duty to defend BFC, Carter and Dunham in the Hermanson Action under the Liberty Mutual policy. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law;

H. As to Count Twelve, Plaintiff seeks a declaration that Liberty Mutual has a duty to indemnify BFC, Carter and Dunham in the Hermanson Action under the Liberty Mutual policy. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law;

I. As to Count Thirteen, Plaintiff seeks a declaration that it is entitled to contribution for attorney=s fees and defense costs incurred in the Hermanson Action from Liberty Mutual under the Liberty Mutual policy. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law;

J. As to Count Fourteen, Plaintiff seeks a declaration that it is contractually subrogated to BFC, Carter and/or Dunham's rights under the Liberty Mutual policy, and is entitled to reimbursement for attorney's fees and defense costs incurred in the Hermanson Action from Liberty Mutual under the Liberty Mutual policy. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law;

K. As to Count Fifteen, Plaintiff seeks a declaration that it is equitably subrogated to BFC, Carter and/or Dunham's rights under the Liberty Mutual policy, and is entitled to reimbursement for attorney's fees and defense costs incurred in the Hermanson Action from Liberty Mutual. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law;

L. As to Count Sixteen, Plaintiff seeks a declaration that it is entitled to restitution for attorney's fees and defense costs incurred in the Hermanson Action against BFC, Carter, and Dunham. Plaintiff further seeks attorneys' fees and costs incurred in connection with prosecution of the claim for Declaratory Judgment, as allowable under applicable law; and,

M. As to all Counts, Plaintiff seeks such other and further relief as the Court may deem just and equitable in light of the nature of the case.

Respectfully submitted,

PICKENS, BARNES & ABERNATHY

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